DATIN AZIZAH ABDUL GHANI

v.

DEWAN BANDARAYA KUALA LUMPUR & ORS.

HIGH COURT MALAYA, KUALA LUMPUR
ABU MANSOR ALI J
[ORIGINATING MOTION NO. R1-25-28 TAHUN 1991]
23 MARCH 1992

ADMINISTRATIVE LAW: *Certiorari - Decision of Datuk Bandar Kuala Lumpur - Planning permission - Right to be heard - Person aggrieved - Right to appeal - Whether owner could object development on adjoining land - Locus standi - Inconsistent provisions - Removal of rights by statute.*

The applicant prays for the order of *certiorari* to quash the decision of the Datuk Bandar Kuala Lumpur of 10 January 1991 granting a planning permission in respect of Lot 4951 which is adjoining to her land for the construction of apartment of two and three storeys high. In her prayer the applicant contends that her right to a fair hearing had been infringed by the decision as she had not been given the notice of the intended plans for her to reserve objections. The applicant alleges that the Datuk Bandar's decision should be quashed as it infringes natural justice and is therefore void. The applicant further avers that s. 6 of the City of Kuala Lumpur (Planning) Act 1973 save such rights so long as they are not inconsistent with the Federal Territory Planning Act 1982.

The respondent however, in reply submitted that the applicant's right to be heard under the old regime had been abrogated by another statute and there was no obligation on the part of the Datuk Bandar to give notice to adjoining owners as required under the repealed rr. 5, 6 and 11 of the Planning (Development) Rules 1970 as such right had been removed by the 1982 Act: Hence the removal of the adjoining owners *locus standi* unless the neighbour is guilty of bringing dangerous chattel and is caught by the *Rylands Fletcher* rule or he is guilty of nuisance. The respondents further contended that if the 1970 rules are still applicable they would be inconsistent with the present legislation in force.

Held:

The Federal Territory Planning Act 1982 gives the applicant no right in respect of the planning permission granted on 10 January 1991 for her representations to be heard and she was not a person aggrieved. Since the applicant was not entitled to be notified any longer because of deletion of s. 17(3) of the City of Kuala Lumpur (Planning) Act 1973 (1973 Act) and the fact that the applicant did not receive her letters, as she complained did not go anywhere as it becomes academic.

[Application dismissed with costs to respondents.]

Cases referred to:

B. Surinder Singh Kanda v. Government of the Federation of Malaya [1962] AC 322 ***(cit)***
Shamsiah bte Ahmad Sham v. Public Services Commission Malaysia & Anor. [1990] 3 MLJ 364 ***(cit)***
Attorney-General v. Thomas D' Arcy Ryan [1980] AC 718 ***(cons)***
District Council Central, Province Wellesley v. Yegappan [1966] 2 MLJ 177 ***(cons)***
Buxton & Ors. v. Minister of Housing and Local Government [1961] 1 QB 278 ***(cons)***
Simpson v. Edinburgh Corp. [1960] SC 313 ***(foll)***

Legislation referred to:
City of Kuala Lumpur (Planning) Act 1973, ss. 17(3), 19, 21(3), 48
Federal Territory (Planning) Act 1982, ss. 23, 65
Planning (Development) Rules 1970, rr. 5 to 11
Town and Country Planning Act 1959 [UK], ss. 31(1), 37

Other sources referred to:
Journal of Planning & Environment Law (1981) on "Third Parties & Development Control - A Better Deal for Scottish Neighbours?", C.M. Brand and Brian Thompson
Stroud's Judicial Dictionary, p. 1270

For the applicant - C. Abraham; M/s Shearn Delamore & Co.
For the 1st and 2nd respondents - Zaki bin Tun Azmi; M/s. Rashid & Lee
For the 3rd and 4th respondents - Balwant Singh Sidhu; M/s. Balwant Singh Sidhu & Co.

JUDGMENT

Abu Mansor Ali J:

Pursuant to leave being granted, the applicant filed a notice of motion praying for orders to have removed to this Court, for the purpose of it being quashed, the planning permission of Datuk Bandar Kuala Lumpur. In prayer (1) the applicant prayed for an order of *certiorari* to remove to this Court for the purpose of its being quashed the decision of the Datuk Bandar Kuala Lumpur of the 10 January 1991 granting a planning permission on Lot 4951 allowing increase in density from 10 persons to 44 persons per acre, for the building of two blocks of apartment of two and three storeys high. The applicant alleges that that order should be quashed as it infringes natural justice and therefore void.

At the hearing, however, the applicant was interested only in this prayer (1) and did not proceed with the other prayers.

The grounds upon which the relief is sought is in the applicant's affidavit in encl. (1). In her affidavit she related that applicant is owner of Lot 4948 of Bukit Tunku since 16 June 1981. It is adjacent to Lot 4951 (subject lot) on which planning permission had been approved by Datuk Bandar to build the said apartments.

In para. 8 of her affidavit encl. (1) she stated that in 1986 an A.R. letter dated 15 September 1986 was sent by Jabatan Perancang Bandar dan Kawalan Bangunan, Dewan Bandaraya Kuala Lumpur informing her that an application for developing the subject lot had been received. She was informed she could make her objection (see "DA3" dated 15 September 1986). The applicant says that the letter "DA3" was addressed to her address at:

8, Simpang Tunku,
Kenny Hill,
50480 Kuala Lumpur.

She sent her objection as in "DA4". After this *vide* "DA6" dated 5 December 1986 she was informed by Jabatan Perancang dan Kawalan Bangunan that the application to build 5 storey apartments on the subject lot was rejected by Bandaraya. Then in para. 15 of encl. (1) she alleged that, early in 1991, applicant noticed some demolition works was going on on the subject land. She then went to Bandaraya planning office and she was shown by an officer of that department 2 letters bearing the same Reference Numbers, DBKL 5729/85, as the earlier letters to her in 1986 but this "DA7" letter dated 25 October 1990 was addressed to her old address:

15, Lorong 17/21F,
Petaling Jaya.

The letter invited objection, if any, to the proposed development on the subject land. Then another letter "DA8" dated 30 November 1990 was also addressed to 15, Lorong 17/21F, Petaling Jaya, giving applicant 14 days from receipt thereof that if there was no objection then planning permission would be granted to the subject land. Applicant stated she never received these letters from Dewan Bandaraya.

The applicant's Counsel Mr. Cecil Abraham, submitted, that the sum total of the evidence is that the applicant was never served with a notice she was entitled to as an adjoining owner. Counsel contended that the notice of 25 October 1990 was not sent in compliance with the Act as applicant never received that letter and, therefore, she never had notice. The same could be applied to Dewan Bandaraya's letter dated 30 November 1990. Assuming this letter 30 November 1990 was received the time of 14 days had already elapsed.

Applicant's Counsel submitted further by not serving the applicant the two letters dated 25 October 1990 and 30 November 1990, the 1st and 2nd respondents had infringed the Planning (Development) Rules 1970 rr. 5, 6 and 11 which read:

5.(1) Upon receipt of any application for planning permission, the Authority shall send to the applicant an acknowledgment thereof.

(2) Upon receipt of any application for planning permission, the Authority shall inform the registered proprietors of the lands adjoining the land to which the application relates in Form 4 of the First Schedule of their right to object to the application.

(3) Any registered proprietor of any land adjoining the land to which the application relates may object to the application within fourteen days of the date of the notification by the Authority.

(4) The Authority shall within fourteen days after the time specified to file objections hear the applicant, and those persons who have filed their objections.

6.(1) The Authority shall if there are no objections to the application and if the application is in conformity with the comprehensive development plan, make a development order immediately after a lapse of fourteen days of the date of notice in Form 5 of the 1st Schedule.

(2) The Authority shall if there are objections to the application within two weeks after the hearing under r. 5(4) convey the decision to the applicant and those persons who had filed their objections.

Under r. 11 the applicant has a right of appeal to the appeal board.

Counsel for the applicant further submitted that although the new Federal Territory (Planning) Act 1982 does not provide that the Datuk Bandar shall consult adjoining landowners but s. 65, the saving provision of that 1982 Act, saves the provisions of rr. 5, 6, 11 of the 1970 and therefore the rules are still applicable and had not been specifically repealed. They formed a statutory basis for the applicant to be heard and since she was not heard the decision of the Datuk Bandar of 10 January 1991 is therefore void.

For authority the applicant referred the Court to the lines of authorities like *B. Surinder Singh Kanda v. Government of the Federation of Malaya* [1962] AC 322 where the House of Lords held that Inspector Kanda's constitutional right had been infringed as he had been dismissed without being given the opportunity of being heard. He also cited *Shamsiah bte Ahmad Sham v. Public Services Commission, Malaysia & Anor.* [1990] 3 MLJ 364 where Kanda's case

was referred to, where her dismissal was because her past records were used for her dismissal and she was not given an opportunity to be heard. He also cited *Attorney-General v. Thomas D'Arcy Ryan* [1980] AC 718. It was held respondent was entitled to a fair hearing.

Applicant prayed for an order in terms of prayer (1).

Datuk Zaki Tun Azmi appearing for 1st respondent, Dewan Bandaraya Kuala Lumpur, and Datuk Bandar, the 2nd respondent, on the other hand, contended that under present law there is no longer any obligation for Datuk Bandar to give adjoining landowners any notice as required under rr. 5 and 6 of the (1970) Rules as that right had been removed by the Federal Territory Planning Act 1982 (1982 Act).

Tracing the history of an adjoining owner's rights to be heard, in the face of an application for planning permission, learned Counsel referred me to Emergency (Essential Powers) Ordinance No. 46, 1970 (1970 Act). Planning (Development) rr. 5, 6 to 11 were enacted under the 1970 Act. After that the 1970 Act was repealed by the City of Kuala Lumpur (Planning) Act 1973 (1973 Act). Section 48 of the 1973 Act still save the 1970 rules enacted so long as they were not inconsistent with the provisions of the 1973 Act.

Section 17(3) of the 1973 Act provided as follows:

> 17. (1) not applicable.
>
> (2) not applicable.
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> (3) Upon receipt of the application for planning permission the Commissioner shall by notice in writing served on the owners of the lands adjoining the land to which the application relates inform them of their rights to object to the application and to state their grounds of objection within fourteen days of the date of service of the notice.

Counsel says when the 1982 Act is examined it appears that the whole of subsection 3 of s. 17 had been removed and a new subsection 3 of s. 21 is now operative. The new subsection 3 omits mention of adjoining owners, giving only the applicants for planning permission to be heard.

Datuk Zaki submitted it must be read that the legislature had intended that the right of hearing for the adjacent landowners given in [1973] had now been removed by 1982 Act. He contended further that the present position is that when there is a proposed development the adjoining landowner has now no more right of hearing, in so far as what his neighbour wants to do with his land, so long as he could get a development order unless of course the neighbour is guilty of bringing any dangerous chattel and he is caught by the *Rylands Fletcher* rule or he is guilty of nuisance.

Counsel in support cited the case of *District Council Central, Province Wellesley v. Yegappan* [1966] 2 MLJ 177 which was an appeal against the decision of the High Court which issued an order of *certiorari* to quash the decision of the District Council Central, approving the site plan and building plans constituted in a housing scheme. On appeal it was held the appellant had no *locus standi* as he had not shown that any legal right or interest belonging to him would be affected by the approval of the plan. The other two Federal Court Judges were unanimous.

Respondent's Counsel submitted that the landowner's right to be heard was given by statute. It has now been taken away by the 1982 Act. Section 23 of the 1982 Act went further by providing for appeal to the appeal board by only those landowners whose application for planning permission had been rejected.

En. Balwant Singh Sidhu for the 3rd and 4th respondents, the landowner and contractor of subject lot adopted Datuk Zaki's submission, but emphasised that since s. 17(3) of the 1973 Act, the provision giving the landowners the right to be heard, had been omitted by the 1982 Act, he submitted that the adjoining owners cannot now be heard.

Learned Counsel also submitted on the question of the present applicant's *locus standi*. Has applicant *locus standi* in the face of the omission of her right, if that is the case? Counsel referred to the preamble to the 1982 Act - it was for the control of proper planning. Counsel quoted from the Journal of Planning and Environment Law [1981] on "*Third Parties and Development Control - A Better Deal for Scottish Neighbours?*" by C.M. Brand and Brian Thompson. I quote:

> When the Lord Ordinary (Lord Guest) in giving his decision in *Simpson v. Edinburgh Corp.* refused to recognise the *locus standi* of the Reverend Simpson to sue for a declarator in respect of grants of planning permission which he alleged were *ultra vires*, his Lordship established an important principle of planning and administrative law. Simpson was an owner-occupier of property in a Georgian Square in Edinburgh and wished to challenge the validity of the grant of planning consents to Edinburgh University which involved the demolition of two sides of the square. The Lord Ordinary held he had no title to sue. He said:
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> > From the preamble to the Act of 1947 it is apparent that it is a public code for planning the development of land ... It is not intended primarily for the protection or benefit of individual proprietors ... In the general case, there are no provisions for notice to neighbours before or after planning permission is granted: the neighbour is given no *locus* at the hearing of the application for planning permission nor is he given any right of appeal against a grant of permission.

Learned Counsel submitted, in the same manner the present applicant has now no right to be heard. He went further that even if she has, she must strictly show how she has been prejudiced. The present applicant must show more. He must show how he has been substantially prejudiced. He cited the case of *Buxton and Ors. v. Minister* of *Housing and Local Government* [1961] 1 QB 278 in a case where owners of an adjoining property applied to the High Court under s. 31(1) of the Town and Country Planning Act, 1959 to quash the decision of the Minister, on the ground that the proposed operations by the company would injure their land, and they were persons aggrieved. It was held the expression "person aggrieved" in a statute meant a person who had suffered a legal grievance; that anyone given the right under s. 37 of the Act of 1959 to have his representations considered was a person aggrieved if those rights were infringed; but the applicants therein had no rights under the statute, and therefore had no right to challenge the Minister's decision.

Mr. Cecil Abraham in reply submitted that the repeal of 1973 Act by the 1982 Act does not delete rr. 5, 6 and 11 of 1970 rules. It was saved by s. 65 of the 1982 Act, so long as they are not inconsistent. They are not so if they are not in conflict with the 1982 Act. He submitted that there is no provision in the 1982 Act, that are in conflict with rr. 5, 6 and 11. He submitted that if it was the intention of Parliament to take the applicant's right surely the rules had been repealed. He cited the meaning of "inconsistent" from *Stroud's Judicial Dictionary* p. 1270 as:

> Inconsistent (1) When a statute says that its provisions are to obtain as regards its subject-matter, except so far as they may be "inconsistent" with a previous statute, the inconsistency connoted must be one "so at variance with the machinery and procedure indicated by the previous Act that, if that obligation were added, the machinery of the previous Act would not work.

He submitted the 1982 is silent on the rights of the applicant but he said the 1970 Rules are clear and applicant has a statutory right to be heard still.

Do these rules still survive?

Mr. Balwant Singh Sidhu in contending that rr. 5, 6 and 11 are inconsistent with the 1982 Act urged the Court to go over the rules themselves.

I considered carefully the 1970 rules, as applicant's Counsel submitted they are the foundations of their applicant's case for *certiorari*. I have but to agree with Counsel for the respondents, that rr. 5, 6 and 11 thereof are inconsistent with the 1982 Act. Basing myself on the definition of the word "inconsistent" in *Stroud's Judicial Dictionary*, I find the inconsistent provisions connoted are one "so at variance with the machinery and procedure indicated by the previous Act that, if that obligations were added (to the 1982 Act) the machinery of the previous Act would not work".

I am of the view that rr. 5, 6 and 11 are inconsistent as there are no longer such machinery as giving notice to adjoining landowners in the 1982 Act. The machinery in r. 11 is indeed clearly devoid of any meaning as there no longer exist the machinery of appeal as provided in s. 19 of the 1973 Act (repealed).

From here I rule the right to be heard which the applicant had under the 1973 Act had been abrogated by the 1982 Act. I also rule that rr. 5, 6 and 11 of the 1970 rules is no longer available to the applicant to assist her to be heard as an adjoining owner when the planning permission for the subject lot was passed by Datuk Bandar on 10 January 1991. Since her right to be heard had been so taken away I find myself bound even more by the authority of *District Council Central, Province Wellesley v. Yegappan* [1966] 2 MLJ 177 FC. As submitted by Counsel for the applicant the law on *locus* might have been taken a step further in our land, I am aware, but in the field of planning law this is my authority or the authority shown to me as regards *locus standi* where, as stated, *certiorari* was granted by the High Court because it held there was right that was infringed hence the order for *certiorari*. The Federal Court in allowing the appeal held there was no recognisable legal right of the respondent infringed, not even the possibility of speculative nuisance in the future. The Federal Court allowed the Council's appeal as it held that the adjoining landowner was not a person aggrieved. *Certiorari* is not available for vindicating mental or sentimental injury. In the present matter before me the 1982 Act gives the applicant no right in respect of the planning permission granted on 10 January 1991 for her representations to be heard. I would also apply the case of *Buxton and Ors. v.* Minister of Housing and Local Government [1961] 1 QB 278 and say she was not a person aggrieved. I also hold that since the applicant was not entitled to be notified any longer because of deletion of s. 17(3) of the 1973 Act, I have to hold that the fact that the applicant did not receive her letters, as she complained, did not go anywhere as it becomes academic. In coming to my decision I was persuaded to adopt *Simpson v. Edinburgh Corp.* [1960] SC 313 as being in line with the case of *District Council Central, Province Wellesley v. Yegappan* [1966] 2 MLJ 177, a case, which held that even assuming there were definite breaches (of planning law) the applicant had no *locus standi* as he had not shown that any legal right or interest belonging to him would be affected by the approval of the plans. By the same token, I also hold, her allegation of the breach of natural justice, because the applicant was not duly served by the 1st and 2nd respondents must fall to the ground. I accordingly dismiss this application for *certiorari* with costs to the respondents.

Also found at [1992] 2 CLJ 1208